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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DONALD RAY HUBBARD, Defendant and Appellant.	C067576 (Super. Ct. No. 10F00933)

Following a jury trial, defendant Donald Ray Hubbard was found guilty of stalking, assault with a deadly weapon, and two counts of misdemeanor making annoying telephone calls. The trial court sentenced defendant to three years and eight months in state prison.

On appeal, defendant contends there is insufficient evidence to support his convictions for assault with a deadly weapon and making annoying telephone calls, and he is entitled to additional presentence conduct credits. We modify the award of presentence credits and affirm the judgment as modified.

FACTS

Defendant lives in Fair Oaks, California, and is a residential customer of the Fair Oaks Water District (district). Tom Gray (Gray) is the district's general manager, and lives with his wife Bridgette, daughters Rachel and P. G., and son T. G. in the same neighborhood as defendant.[1]

Defendant was involved in at least two disputes with the district as of June 2009. One dispute arose from an incident two years earlier, when the district installed a water meter on defendant's property and damaged his driveway. In June 2009, the district had left a notice on defendant's door stating he was violating their water conservation policy. Defendant went to the district's office to complain about the policy on June 12, 2009. Defendant was very upset; he was combative about the notice, and said that the district should stay off his property.

Defendant asked for Gray while he was at the district's office. When told Gray was not in, defendant said the district should not get involved in issues that he has with his neighbors. Defendant threatened the district with lawsuits over the meters installed on his driveway, and said that he would make his neighbors' lives so miserable that they would move.

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[1] To avoid confusion, we will refer to the family members by their first names with the exception of Tom Gray to whom we will refer to as Gray.

On June 15, 2009, defendant called the district and asked for Gray. Told he was on vacation, defendant said he knows when Gray goes home and where he is. Defendant said he had a lawsuit against Gray and was going public the following day. In another June 2009 telephone conversation, defendant instructed the district employee to give the following message to Gray: "at this point going forward it was personal. Tell Mr. Gray that it's personal." Defendant also said something to the effect that it was not going to end, and he had the resources to continue.

Defendant went to the district office on June 18, 2009, after receiving a second notice for violating the water conservation policy. Defendant said he was quite upset about district personnel entering his property, and he wanted all correspondence to be done via telephone. Using a threatening manner, defendant said district personnel should not come on his property or they would be bitten by dogs, and reiterated that the district should not get involved in a dispute between neighbors.

On July 6, 2009, defendant came to the district office to make a payment with a plastic bag full of coins which he placed on the countertop. After a district employee refused the payment, defendant got very angry and threw the coins on the countertop and floor. He said to tell Gray that Gray's home address had been distributed throughout the district so that people like defendant can visit whenever they felt like it. Defendant claimed the district would be in trouble for refusing

his payment, and it would suffer every gimmick he can come up with.

Defendant eventually paid his bill with a credit card that day. He also talked about the employee's accent and how the employee did not properly speak English. Noticing the employee's business card, defendant remarked that the employee had unusual first and last names, making it easy for defendant to find him. The employee felt personally threatened by defendant.

Defendant called the district and asked for Gray on July 30, 2009. When told Gray was not in the office, defendant replied that he was watching Gray's house on closed circuit television, and "I also know where his kids go to school."

Twenty-year-old Rachel testified that defendant had scared her and her family for a "very long time." Starting when she was 12, defendant would make Rachel nervous by the looks he would give her when he drove, as well as by how fast and how loudly he played the music when driving. Defendant's activities worsened once things started happening between him and her father.

On January 20, 2010, Rachel was coming home from work when she noticed defendant's silver BMW traveling in the opposite direction. After they passed each other, defendant made a U-turn and went in the same direction as she was going. Rachel reached the house and parked in a different location from her regular spot in order to be closer to the front door.

Rachel saw defendant coming down the street as she parked. Defendant drove on the wrong side of the road, as if coming at Rachel and her car. He was close enough to hit her or the car, so Rachel got back in her car and shut the door. Defendant then slowed down and drove by her. As he drove by, defendant looked like he was taking a picture of Rachel with his cell phone. After passing Rachel's car, defendant accelerated and drove off.

Rachel testified about another incident which took place within a couple of weeks of the January 20 incident. Rachel was with her then boyfriend Chris Coyle, who was picking her up, and parked near the Gray family's house. Rachel saw defendant's BMW as she walked toward Coyle's truck. Rachel pointed the BMW out to Coyle and then walked in front of Coyle's truck, toward the passenger side. Rachel had to stop because defendant drove so close by that she thought he would hit her or Coyle's truck.

Coyle testified that he and Rachel were standing by his truck when they noticed defendant's white or silver BMW coming up fast and in the wrong lane. The car headed toward Coyle's truck before veering away and driving off. Coyle and Rachel were in the bike lane, so the BMW was pretty close to them. Coyle estimated that defendant's car was four to five feet from his truck.

Coyle felt like defendant was playing chicken with them. He was more angry, but Rachel was terrified. He thought defendant's BMW was going 45 miles per hour.

Bridgette's friend Elisha Sorensen went to the Gray's house to see Bridgette on September 16, 2009. As she got out and

walked toward the back of her vehicle, a gray BMW driven by defendant came directly toward her, accelerating as if he was playing chicken. The BMW swerved when it was about 10 feet from Sorensen, missing her by four to five feet as it went around the corner and drove off.

According to P. G., defendant committed many intimidating acts to her, but two stood out. Near Christmas 2009, an unknown man knocked on the door and hand-delivered a wrapped Christmas package to the Gray family. The man was not in a uniform, and a car was parked in the shadows nearby. P. G.'s stepmother Bridgette accepted the package from the man.

The man said he was ordered to deliver the package to the Gray family and apologized for being late. He would not identify who sent the package, but said the sender had a message, that he knew where the Grays lived. The man was very evasive when asked who sent the package and left in a hurry after delivering it. The package contained what appeared to be legal documents stating reasons for defendant suing Gray.

The second incident related by P. G. took place in summer 2009. P. G. was outside by the front door, waiting for her seven-year-old brother T. G. to come so they could take the dog for a walk. Defendant pulled up in his car and stopped in the middle of the street, about five feet before the stop sign. Defendant, with his arm around the passenger seat, made gestures toward her and stared up and down at P. G. in an inappropriate manner. P. G. was so upset she went inside the house, distraught and crying.

Defendant would also drive by their house unnecessarily, doing so quickly and frequently. Some nights he would pull up in the middle of the street and blast music from his car. Defendant would also park his car across the street in an area not covered by streetlights, turn off his lights, and sit there. Defendant made P. G. feel like a prisoner in her home for over two years.

Lorna Adams met her friend Bridgette at the Gray's house on the evening of January 14, 2010. Adams saw defendant walking down the street talking on his cell phone. Defendant was talking unusually loudly and said, "you should have him shot or just push the old man down the stairs." Defendant stopped in front of them and made the remark from across the street, then smiled maliciously at them after making the remark.

Gray testified that defendant is an "extremely disgruntled" customer of the district. The district had a complaint against defendant for violating its restrictions against wasting water. This led to fines and, at one point, defendant's water was shut off.

Gray first learned about defendant's problems with the district in spring 2009. By June 2009, Gray heard from coworkers about specific threats against him from defendant. Defendant also made intimidating statements directly to Gray, such as "you don't know what a vindictive prick I can be, and you'll find out." According to Gray, every phone conversation he had with defendant at the district was "vulgar and foul."

On August 30, 2009, defendant drove up to the Gary's house while Gray was in the driveway, made an obscene gesture at Gray, and drove around the corner. Defendant then stopped in the middle of the street and stared down his daughter P. G. and son T. G. Gray then drove to defendant's house and parked nearby. As Gray walked toward defendant's house, defendant ran inside his home. When Gray left, defendant came outside and said, "hey," "where are you going," before Gray walked away.

Defendant's habit of playing loud music outside their house continued after this incident. Defendant did so almost daily, and sometimes as often as five to six times in a day. It did not stop until Gray obtained a restraining order against defendant. Gray related that defendant has sued Gray and district several times, and that defendant's campaign has had a tremendous impact on Gray and his family.

DISCUSSION

I

Assault With A Deadly Weapon

Defendant contends there is insufficient evidence to support his conviction for assault with a deadly weapon, stemming from the incident with Rachel and Chris Coyle. We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial

evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

In reviewing the sufficiency of the evidence, the relevant inquiry is not whether this court is convinced of defendant's guilt beyond a reasonable doubt, but "'whether "'any rational trier of fact'" could have been so persuaded.' [Citation.]" (*People v. Hernandez* (2003) 30 Cal.4th 835, 861, italics omitted.) If the evidence supports the jury's verdict of guilty, the opinion of an appellate court that the evidence might also be reconciled with a contrary finding does not require reversal of the judgment. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1054.)

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code,[2] § 240.) Assault with a deadly weapon is "an assault upon the person of another with a deadly weapon . . . ." (§ 245, subd. (a)(1).) The mental state for assault requires "actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another." (*People v. Williams* (2001) 26 Cal.4th 779, 782.)

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[2] Subsequent undesignated statutory references are to the Penal Code.

An "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury may occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams*, *supra*, 26 Cal.4th at p. 790.) "The pivotal question is whether the defendant intended to commit an act likely to result in . . . physical force, not whether he or she intended a specific harm. [Citation.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 218, fn. omitted.)

"It is not necessary, in order to complete the offense of assault with a deadly weapon, that the intended victim be actually injured." (*People v. Ingram* (1949) 91 Cal.App.2d 912, 914.) Indeed, "[o]ne may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Defendant argues the evidence does not support a finding that, in driving toward Rachel, he committed an intentional act with knowledge that the act would probably and directly result in the application of force on her. He notes that he drove no closer than four to five feet from Coyle's truck and that neither Coyle nor Rachel could have touched defendant's car as it drove by. Defendant asserts that "[p]eople drive in close

proximity to other vehicles and persons all the time, but are not charged with assault."

Defendant attempts to distinguish this case from *People v. Golde* (2008) 163 Cal.App.4th 101, where the defendant repeatedly accelerated toward the victim and maneuvered the car in an attempt to chase her down as she attempted to avoid being hit. (*Id.* at p. 109.) Although *Golde* was more egregious, this does not help defendant.

Defendant drove toward his victims on the wrong side of a residential street, reaching speeds of 45 miles per hour as he approached them. While defendant swerved away after getting close, he was still within four to five feet of the truck the couple stood next to. Defendant's actions caused Rachel to change her path to avoid being struck by him; she told a deputy that she had to stop short to avoid being hit by defendant as he crossed over the line. His conduct is sufficient to support his conviction for assault with a deadly weapon.

Defendant's argument that automobiles routinely run close to pedestrians without an assault taking place fails because it takes his actions out of context. Defendant was not merely driving close to Rachel, he drove *at* her. A driver who stays inside his lane as he drives by a pedestrian on the sidewalk is no threat, even if he comes within four or five feet of that pedestrian. That driver presents a far greater threat if, like defendant, he drives at the pedestrian on the wrong side of the street and at a high rate of speed.

It is also no help to defendant that he veered away from his victim. Driving toward a pedestrian at 45 miles per hour is an inherently dangerous act. Rachel had to change her movement to avoid being hit -- that defendant did not strike her is her (and his) good fortune. Substantial evidence supports the jury's verdict.

II

Annoying Phone Calls

Defendant contends there is insufficient evidence to support his convictions for making annoying telephone calls. We disagree.

Subdivision (a) of section 653m provides: "Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith." For the purpose of section 653m, "'obscene'" is defined as language which is "'offensive to one's feelings, or to prevailing notions of modesty or decency; lewd.'" (*People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383, fn. 5.)

Defendant's convictions are based on two incidents. On July 28, 2009, defendant called the district after receiving a second notification that he was violating the district's water conservation policy. Shawn Huckaby, an operations

superintendent with the district, took the calls. Defendant, who called 30 to 40 times that day, was "very vulgar" and used "a lot of cuss words." Huckaby tried to explain to defendant why he was in violation of the district's policy, but defendant told him the matter was now "personal" between himself, Huckaby, and Gray. Defendant also said that he was trained in the art of combat. He told Huckaby he would "[f]ind out what happens if you step on my fucking property." According to Huckaby, the word "fuck" or its derivatives was the most vulgar language used by defendant.

The second incident involved defendant's call to Gray at the district office on July 28, 2009. Gray heard from coworkers that defendant had made personal threats against Gray. Calling Gray, defendant told him "you don't know what a vindictive prick I can be, and you'll find out." Gray testified that every communication he had with defendant was "vulgar and foul."

Defendant's argument is based on *People v. Powers* (2011) 193 Cal.App.4th 158. In *Powers*, the defendant made frequent calls to an ice cream shop. (*Id.* at p. 160.) The calls were not answered by a live person; defendant instead left lengthy messages on the store's answering machine. (*Ibid.*) The defendant's tone on the message alternated "between praise with laughter and belligerency using profanity." (*Id.* at p. 161.) His calls had one common theme: "he claims that he is being shorted, 'ripped off,' when he is buying a 48-ounce quantity of ice cream and is receiving less than that. He also complains that other customers in the store bother him. He has a penchant

for the 'F' word and says, 'I have the right to complain.'" (*Ibid.*) In short, the defendant's calls "us[ed] an abundance of vulgarities derived from sexually related terms, but not lewdly" and "did not threaten to harm the recipient of his consumer complaints." (*Id.* at p. 160.)

The Court of Appeal held that there was insufficient evidence to support the defendant's convictions for making annoying telephone calls. (*People v. Powers*, *supra*, 193 Cal.App.4th at p. 164.) According to the *Powers* court: "The messages are annoying rants concerning customer service. It is reasonable for someone to be annoyed by appellant's language. But the vulgarities uttered cannot be described as obscene, especially in the context of a customer service line maintained to take complaints. Except in extreme cases, we doubt that a person whose job it is to receive consumer complaints has a right to privacy against unwanted intrusion. [Citation.] Of course, the line can be crossed if and when the caller threatens injury and/or uses obscene language lewdly." (*Id.* at p. 166.) Since the defendant "did not cross that line," the Court of Appeal reversed his convictions. (*Id.* at pp. 166, 167.)

The *Powers* decision distinguished *Hernandez*. (*People v. Powers*, *supra*, 193 Cal.App.4th at p. 166.) In *Hernandez*, the defendant made approximately 80 telephone calls over a two-week period to the manager of an apartment building in which the defendant's ex-boyfriend lived. (*People v. Hernandez*, *supra*, 231 Cal.App.3d at p. 1380.) The former boyfriend had obtained a

restraining order against the defendant, but he called the apartment manager to relay messages to him. (*Ibid.*) Defendant would call several times a day, often several minutes apart. (*Ibid.*) In one sequence, the defendant called the manager a "'f---bitch,' hung up the phone, called several more times and 'played a tune' with the telephone buttons, then called again and said he 'wouldn't give up' and 'would keep calling until he got what he wanted.'" (*Ibid.*) The manager "also received a number of 'hang-up' calls, several calls in which she would hear only 'weird laughter,' and other calls in which appellant would call [the manager] obscene names. Appellant also threatened [the manager], stating, 'You're in deep trouble, bitch,' and telling [the manager] she would 'pay' if he went to jail." (*Ibid.*, fn. omitted.)

The trial court instructed the jury that "'"obscene" means offensive to one's feelings, or to prevailing notions of modesty or decency; lewd.'" (*People v. Hernandez*, *supra*, 231 Cal.App.3d at p. 1384.) The Court of Appeal upheld the instruction, finding that defendant's calls were obscene and, even if they were not obscene, still violated subdivision (a) of section 653m because there was sufficient evidence defendant threatened to injure the manager. (*Hernandez*, at pp. 1386-1387.)

In *In re C.C.* (2009) 178 Cal.App.4th 915, we addressed whether text messages from a teenager to a former girlfriend were obscene or threatening under section 653m. (*C.C.*, at p. 917.) While the messages involved repeated use of common swear words derived from sexually related terms, we concluded

that the texts were not obscene because "it is inappropriate to extract isolated words from a private message and impose *criminal* liability based on their abstract offensiveness." (*C.C.*, at pp. 919-920.) We explained: "Although the [text messages] used vulgarities derived from sexually related terms . . . , those words were not used lewdly. They were expletives used as verbs and adjectives to emphasize the depth of [the minor's] feelings, and in a couple of places as insults to describe how he felt about [the recipient] as a result of her conduct." (*Id.* at p. 921.) Placed in their proper context, the messages could not be understood to be obscene. (*Id.* at p. 922.)

Defendant argues that his phone calls did not involve personal threats to either of the recipients and were not obscene. He asserts that his calls were like the messages in *Powers* and the texts in *C.C.*

As in *Hernandez*, we examine defendant's calls in their proper context. The call to Gray and the series of calls to Huckaby were not isolated incidents, but part of a series of harassing and intimidating acts against Gray and the district. Examined in this context, a reasonable trier of fact could infer from defendant's remark to Huckaby that the dispute was now personal between them, and his statement that he was trained in the art of personal combat that defendant was threatening to injure Huckaby.

Defendant's statement: "find out what happens if you step on my fucking property" is further evidence of personal threat.

Defendant's contention that this threat is too contingent ignores the context of the conversation. His complaint with the district stemmed in part from district employees entering his property to post violation notices, and from the earlier dispute when his property was damaged when the district installed a water meter. In light of defendant's relationship with the district, his threats were not so contingent as to remove them from the scope of section 653m.

A reasonable trier of fact can read defendant's statement to Gray -- "You don't know what a vindictive prick I can be, and you'll find out" -- as threat of personal injury in light of defendant's prolonged harassment. This statement was made in a conversation that Gray said was laced with vulgar and foul language. As in *Hernandez*, the language was offensive to Gray's feelings and prevailing notions of modesty and decency.

Defendant's calls were not like the texts in *C.C.* -- "words used by an agitated, frustrated high school boy to his former high school girlfriend, [where] both parties to the communication attended a high school where such communication is in common parlance." (*In re C.C.*, *supra*, 178 Cal.App.4th at p. 922.) Nor were his calls like the ones in *Powers*, calls left to a store's answering machine expressing a customer's frustration and anger regarding the service accorded to him and other customers. (*See People v. Powers*, *supra*, 193 Cal.App.4th at pp. 160-162.) They were part of an extensive campaign of harassment by defendant against the district, its general

manager, and his family. As such, they are within the ambit of section 653m, subdivision (a).

III

Credits

The trial court awarded defendant 39 days' presentence credit, consisting of 27 days of custody and 12 days of conduct credit.

Defendant, who was sentenced on March 4, 2011, is entitled to additional conduct credits pursuant to the January 25, 2010 amendments to section 4019. (§ 4019, subd. (h); former § 4019, subds. (b)(2), (c)(2).) Having served 27 actual days, defendant is entitled to 26 conduct days, for a total of 53 days of presentence credit.

DISPOSITION

The judgment is modified to provide for 26 conduct days for a total of 53 days of presentence custody credit. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.